

Tran (Migration) [2022] AATA 1593 (8 March 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Kien Vung Tran
VISA APPLICANT:	Mr Huu Phuc Nguyen
REPRESENTATIVE:	Mr John William Galloway (MARN: 9254439)
CASE NUMBER:	2007074
DIBP REFERENCE(S):	BCC2018/5802249
MEMBER:	Peter Emmerton
DATE:	8 March 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 08 March 2022 at 4:03pm

CATCHWORDS

MIGRATION –Partner (Provisional) (Class UF) visa - subclass 309 – parties are validly married – applicants are in a genuine spousal relationship– evidence of long-term commitment to a spousal relationship – marriage is valid for the purposes of the Act – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 February 2020 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 24 December 2018 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 14 February 2020 on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the couple were in a genuine spousal relationship.
4. The review applicant, Ms Kien Vung Tran, appeared before the Tribunal, via telephone on 8 March 2022, to give evidence and present arguments. The Tribunal also received oral evidence from Mr Huu Phuc Nguyen the visa applicant via telephone from Vietnam.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the couple is in a genuine spousal relationship as defined by section 5F of the Act.
9. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
10. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department

11. Whether the parties are in a spouse or de facto relationship

12. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all

others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

14. Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The delegate accepted a Marriage Certificate as evidence that the couple were legally married and the marriage was registered on 26 October 2017 in Phung Hiep district, Hau Giang province. The Tribunal also accepts this evidence and has viewed the documents and certified translation. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

16. Are the other requirements for a spousal relationship met?

17. In forming an opinion whether they are in a spousal relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
18. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 24 December 2018 on the grounds of being in a spousal relationship with an Australian citizen, Ms Tran.
19. The visa applicant is a male Vietnamese national by birth, (DOB 1 January 1971) who is divorced.
20. The sponsor is a female Vietnamese national by birth, (DOB 6 June 1966) and an Australian citizen by grant, who has declared 1 previous married relationship and subsequent divorce.
21. The Tribunal accepts as fact that both applicants are legally divorced as per the documents provided to it.
22. According to information on file, it is indicated in the statement of relationship that the visa applicant and sponsor first met each other on 4 October 2015. The engagement was held during the sponsor's trip to Vietnam on 1 October 2016. The wedding was held during the sponsor's trip to Vietnam from 17 September 2017 to 27 October 2017. The couple were legally married, the marriage was registered on 26 October 2017 in Phung Hiep district, Hau Giang province.
23. The sponsor again departed Australia for Vietnam on 3 June 2019 and returned to Australia on 20 June 2019. Departmental systems indicate that the sponsor has not departed Australia and the visa applicant has not travelled to Australia since this date.
24. According to departmental records the visa applicant has travelled to Australia on 1 occasion, visiting from 18 March 2009 until 15 June 2009.
25. The Tribunal has considered the documentary and verbal evidence provided to the Department and the Tribunal. The Tribunal, has had the benefit of taking oral evidence via telephone from the sponsor at the hearing as well as oral evidence via telephone from the visa applicant. The Tribunal found all of those presenting evidence to be credible and

persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal has considered all aspects of the relationship.

26. The Tribunal has determined that there is a demonstrated clear mutual commitment to a shared life together. This is indicated through the fact the couple are married and they have declared their marriage to a government body in Vietnam. It is also indicated through the fact that despite being separated for nearly 3 years now, the review applicant and visa applicant appear to have remained mutually committed to each other. They profess that the love for each other is as strong as ever and has survived the time they have been forced to spend apart. This was explored during the hearing and verified by the 2 witnesses Statutory Declarations dated 30 January 2018 and 6 April 2018, both on Form 888.
27. The review applicant and visa applicant displayed a consistent understanding of each other's lives and show a genuine mutual interest in one another. They appear to support one another in all aspects of their life, that is, financially, socially, and emotionally in spite of the limitations imposed by distance. The relationship is in the view of the Tribunal both genuine and continuing.
28. The Tribunal notes that under questioning during the hearing that should the visa applicant be unable to live in Australia the sponsor would return to Vietnam to continue their relationship in marriage.
29. There is no evidence before the Tribunal that the visa applicant and the review applicant have any intention to live separately apart on a permanent basis. The current separation is imposed upon them by the confluence of the Covid 19 pandemic and the initial visa refusal by the department.

30. Financial Aspects of the Relationship

31. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses.
32. In relation to any joint ownership of real estate or other major assets, the Tribunal has determined that the couple do not jointly own any major assets or real estate. This is not in the opinion of the Tribunal unusual for a couple of modest means, currently housed in two different countries, planning to live together in Australia.
33. The Tribunal accepts the verbal evidence that some money has been sent to the visa applicant to assist him to meet day to day living expenses. The amount was declared as approximately AUD\$ 100 per month. This is achieved by the couple operating a joint bank account upon which both individuals can draw. No verifiable documentary evidence has been provided.
34. The Tribunal received no evidence that the couple have any joint liabilities.
35. Whether one person in the relationship owes any legal obligation in respect of the other. The Tribunal has determined that aside from the usual legal obligations associated with a marriage, the couple have not provided any evidence to indicate additional legal obligations. The Tribunal observes that the couple appear to live a relatively uncomplicated and unsophisticated existence and it has taken care to not overlay middle class Australian expectations upon their relationship and living circumstances.

36. The basis of any sharing of day-to-day household expenses. The Tribunal acknowledges that the couple have principally lived apart post marriage except for a brief 3 week period. This will continue until the review applicant is able to take her husband to her home in Australia. Therefore, there is no verifiable evidence of day to day sharing of household expenses.
37. The Tribunal places only moderate weight on the evidence in support of the financial aspects of the relationship because of the circumstances imposed upon the couple by the current Covid-19 pandemic. It further notes that Vietnam is currently in a substantial infection wave whilst Australia's pandemic status is improving.

38. Nature of the Household

39. In relation to the nature of the household aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
40. Any joint responsibility for the care of children. The Tribunal notes that the couple are not young and neither have responsibility for young children nor do their children from earlier marriages live with them. It was clear from questioning the couple individually, that future planning is not focussed upon having further children as a couple. The maturity of the couple combined with the medical status of Ms Tran suggest it is unlikely that they will establish a joint family. No children are included in the visa application.
41. The living arrangements of the visa applicant and the sponsor were discussed. The couple have principally been separated by geography post their marriage. The separation is not of their making as previously stated.
42. Any sharing of responsibility for housework. The Tribunal notes little opportunity has existed to share household responsibilities as they have principally stayed in their respective homes in 2 different countries. Traditional roles occurred during periods of co-habitation which were outlined during the hearing.
43. Hotel receipts in the joint names of the visa applicant and the sponsor were submitted with the visa application indicating that both parties rented a hotel room in Ho Chi Minh City, Vietnam in November 2018 and June 2019.
44. Whilst the hotel receipts indicate that they stayed at the same hotel during the specified dates, there is no evidence that they shared the responsibilities of the household during the specified dates.
45. The Tribunal places moderate weight on the cumulative evidence presented in relation to the nature of the household and again refers to the statements made in paragraph 32 of this Decision.

46. Social Aspects

47. In relation to the social aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
48. The review applicant and primary visa applicant claimed that they present themselves to society as a married couple and as a couple in a committed relationship. The Tribunal has formed the view that this is an accurate claim supported by the fact that the review applicant and primary applicant have provided photographs of themselves in a diverse range of different social settings with friends, family, venerable elders and whilst on holiday together.

These photographs show attendance at a family gathering, social engagements and attendance at a funeral in Vietnam.

49. In addition, the couple are shown to be attending the family shrine and paying their respects to the ancestors. This practice is of considerable significance in Vietnamese culture and is not undertaken frivolously as it is a public declaration of the couple's commitment to each other as witnessed by the ancestors.
50. This is also clearly demonstrated in the statutory declarations of the two witnesses in the Form 888s. In the Tribunal's past experience of this culture, if the community did not in fact view the couple as married, they would have been shunned by many for having an affair out of wedlock.
51. The applicant's witnesses testified in writing that they were cognisant of the ongoing relationship, marriage etc. This clearly indicates that the review applicant's and primary visa applicant's marriage is recognised outside of their family. This fact is also obvious from their marriage certificate, where witnesses attested to their marriage.
52. The Department in their decision refers to 2 tourist visa applications made by the visa applicant, dated May 2018 and June 2019, both of which state the sponsor as the visa applicant's partner and the purpose to visit Australia was to visit the sponsor. The Tribunal also notes that the Department chose to not acknowledge the fact that both visa applications were refused. No verifiable information has been provided to the Tribunal to justify the refusal decisions. The Tribunal observes that by denying the visa applicant the opportunity to visit his sponsor the couple were also denied the opportunity to amass evidence as to the genuine nature of their relationship.
53. The Tribunal notes the following statement made in the Department's decision dated 14 February 2020. *'While you and your sponsor have provided some evidence to demonstrate the social aspects of your relationship, it is not commensurate of a genuine and continuing relationship between you and your sponsor. I therefore am not satisfied that you and your sponsor present themselves to family and friends as being in a committed partner relationship, or are regarded by people as such.'*
54. The Tribunal notes this is somewhat of a '**Catch 22**' circumstance fabricated by the department, as they chose to deny any opportunity for the applicants to meet and demonstrate their asserted committed partner relationship to friends and family. They then went on to penalise them because they did not have the evidence they wanted to see as adequate proof that such a committed partner relationship had been adequately demonstrated to friends and family.
55. The Tribunal places substantial weight upon the cumulative evidence provided in support of the social aspects of their relationship within the constraints created by the department and the Covid-19 pandemic.

56. Nature of the Commitment

57. In relation to the nature of the persons' commitment to each other, the Tribunal has considered the following.
58. The duration of the relationship. The Tribunal was presented with a range of written testimony showing that the relationship evolved over a period of time. It notes that they were not known to each other prior to the more formal introduction and friendship. This was followed by the formal declaration of engagement and subsequent Marriage.

59. The length of time they have lived together. As previously stated, the couple have not lived together for lengthy periods of time, due to circumstances the Tribunal accepts are out of their control. The Tribunal again observes the constraints created by the department and the Covid-19 pandemic.
60. The degree of companionship and emotional support that the persons draw from each other. The Tribunal was convinced by the testimony of the couple, which was supported by the witness statements that the relationship is mutually emotionally nourishing. The demeanour of both the visa applicant and the sponsor demonstrated to the Tribunal the emotionally genuine nature of the relationship and the couple's desire to progress their lives together.
61. The Tribunal determines that the verbal evidence provided during the hearing to demonstrate regular ongoing communication between the visa applicant and the sponsor further strengthens the body of evidence supporting the genuineness of this relationship.
62. Both the sponsor and the visa applicant were able to demonstrate substantial knowledge about each other, their daily activities, occupations and their future plans. The Tribunal notes that whilst the couple have a clear understanding and appreciation of each other's perspective on important issues they didn't always have an identical view. The couple expressed mutually compatible knowledge regarding each other's family circumstances and extended family structures and relationships.
63. The Tribunal places substantial weight upon the cumulative evidence provided in support of the couple's commitment to each other.
64. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
65. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
66. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

67.

68. DECISION

69. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309.211 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Peter Emmerton
Member

70.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).